TAN KHIEN TOONG & ORS.

v.

HONG BEE & CO.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL APPEAL NO. 7 OF 1983]
25 MAY 1984

LANDLORD AND TENANT: *Agreement for a lease - Void as a lease - Whether enforceable in equity.*

The appellants (the landlords) sued the respondents (the tenants) for possession of the premises in question. The premises were first let to the tenants by the landlords' predecessor-in-title, who was their deceased father, by an agreement in writing dated 31 March 1962. The agreement provided, *inter alia*, that the rent was payable monthly in advance and that the tenant should enjoy uninterrupted occupation of the premises so long as he paid rent as provided.

Held:

[1] The agreement dated 31 March 1962 was enforceable in equity. An agreement purporting to grant a lease of land can be enforced in equity even though such an agreement is void as a lease at law. (*Siew Soon Wah v. Yong Tong Hong* [1973] 1 MLJ 133 PC; *Ong Heng Hwa Realty Sdn. Bhd. v. Teoh Chai Siok* [1977] 1 MLJ 124; *Zimbler v. Abrahams* [1903] 1 KB 577).

[2] The failure to call the person who was claimed by the tenants to be a witness to the payment of "tea-money", did not deprive the tenants in any way of the right to remain in occupation of the premises under the agreement.

[3] Even though the tenants had not counter-claimed for specific performance, they were still entitled not to be turned out of possession, for if they were entitled to specific performance of a lease for 30 years, they were entitled not to be evicted.

[Appeal dismissed.]

Cases referred to:

Margaret Chua v. Ho Swee Kiew & Ors, [1961] MLJ 173 CA
Siew Soon Wah v. Yong Tong Hong [1973] 1 MLJ 133 PC
Ong Heng Hwa Realty Sdn. Bhd. v. Teoh Chai Siok [1977] 1 MLJ 124
In re King's Leasehold Estates [1973] LR 16 Eq. 521
Parker v. Taswell 2 De G. & J. 599
Martin v. Smith LR 9 Ex. 50
Zimbler v. Abrahams [1903] 1 KB 577
Ramsden v. Dyson [1866] LR 1 HL 129
Plimmer v. Mayor etc. of Wellington [1884] 9 App. Cases 699
Errington v. Errington [1952] 1 KB 290
Inwards v. Baker [1965] 1 All ER 446
Chalmers v. Pardoe [1963] 3 All ER 552
Paruvathy v. Krishnan [1983] 2 MLJ 121
Mok Deng Chee v. Yap See Hoi [1981] 2 MLJ 321
Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 86

For the appellants - Leow Shin Fong; M/s. Arifin & Partners
For the respondents - Atma Singh Gill; M/s. Gill & Tang

JUDGMENT

Peh Swee Chin J:

When will the principle that an agreement though void as a lease, can be enforced as an agreement for a lease in equity, ever cease to be questioned in our Courts? This appeal again questions this principle.

The facts can be briefly summarised as follows:
The appellants (the landlords) sued the respondents (the tenants) for possession of the premises in question. The premises were first let to the tenants by the landlords' predecessor-in-title who was also their deceased father, one Tan Kwan, by an agreement in writing dated 31 March 1962. The relevant clauses of the agreement read as follows:

> 1. The tenancy shall commence on 1 April 1962, and the rental of the demised premises shall be the sum of dollars one hundred and seventy (RM170) per month payable in advance on the first day of every month, the rent for the month of April 1962, is paid to the Landlord upon the execution of this agreement (the receipt of which sum the Landlord hereby acknowledges).
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> 2. So long as the Tenant shall pay the monthly rental of the demised premises punctually and promptly on the first day of every month and in any event not later than the fourteenth day of any month, and strictly adhere and abide by the terms and conditions contained herein, the Tenant shall enjoy uninterrupted occupation of the demised premises, and the Landlord shall not hinder, obstruct, or determine the Tenant's right to such enjoyment under any circumstances.
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> 6. In the event of the Tenant committing a breach of any of the conditions contained herein, the Landlord reserves the right, notwithstanding anything expressly stated herein, to terminate and determine the tenancy by giving to the Tenant one (1) calendar month's notice in writing to be sent by registered post to the Tenant's address at No. 171-D Rahang Road, Seremban, and such notice shall be deemed to be served at the time when the registered notice would in the ordinary course be delivered.
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> 7. This, agreement shall be binding on the heirs, executors, administrators, and assigns of the Landlord, and also on the successors, administrators, and executors of the Tenant.

The landlords sent a notice to quit to the tenants on the basis that the tenants were monthly tenants. The tenants, not unexpectedly, declined to quit, and in due course were served with the summons in the Magistrate's Court, Seremban. The tenants succeeded, and the landlords had appealed from the order dismissing their claim for possession. I dismissed such appeal for I found that the learned Magistrate, had very correctly though very briefly directed himself, with commendable clarity, on the questions before him. Now a further appeal has been lodged to the Federal Court.

The landlord contended before the learned Magistrate and before me, to the effect that there was no such thing as a perpetual tenancy; that the tenants were monthly tenants because rent was paid monthly; that the said agreement was void as a lease for non-registration under National Land Code; that the tenants had failed to prove the payment of premium of RM9,000 as deposed to by DW1, so that he was entitled to some equity and that the agreement was void for uncertainty under s. 30 of the Contacts Act 1950.

It is more convenient to dispose of, first, the point regarding the payment of premium of RM9,000 alleged by DW1, the only witness called for the defence. Learned Counsel for the landlords submitted that the tenants had failed to prove it. DW1 had alleged that he had paid it. In cross-examination, he maintained that he had paid it. When asked whether he had proof for it, he said a person called "Ong Kin Thong" could be his witness, but he agreed he had no documentary proof. It was put to him that he never paid it, and he denied. The said Ong Kin Thong was not called. It was submitted by learned Counsel for the tenants to the effect that there was no need to call the witness since documentary proof was required by Counsel for the landlords. I hold that the presence of this witness, if it was ever considered necessary in the interest of the case for the tenants, could not be excused on the ground stated. The essentiality or otherwise of calling this witness in the circumstances of this case will become self-apparent later on in my grounds of judgment.

The tenants contended before me and the Court below that they were let into possession of the premises in question in pursuance of the said agreement; that by paying RM9,000 as "tea-money" or premium, that they had an interest in equity so that their occupation of the said premises was not to be interfered with except for any breach of provision; that they were not in breach for failing to pay rent punctually, or for any other provision; that the agreement was binding on the landlords as successors of the landlord; that the agreement, though not registered as a lease, created a life interest in equity.

Both Counsel cited quite a number of cases in support of their respective submissions, but it is in my view not necessary to refer to them in detail.

In my view, it is now deeply entrenched in our law also that an agreement purporting to grant or lease of land can be enforceable in equity even though such an agreement is void as a lease at law. I need only mention the well-known and often-quoted cases without having, in all cases, to refer to the facts therein. They are *Margaret Chua v. Ho Swee Kiew & Ors.* [1961] MLJ 173 CA; *Siew Soon Wah v. Yong Tong Hong* [1973] 1 MLJ 133 PC; *Ong Heng Hwa Realty Sdn. Bhd. v. Teoh Chai Siok* [1977] 1 MLJ 124; *In re King's Leasehold Estates* [1973] LR 16 Eq. 521; *Parker v. Taswell* 2 De G. & J. 559; *Martin v. Smith* LR 9 Ex. 50, 52; *Zimbler v. Abrahams* [1903] 1 KB 577.

In *Siew Soon Wah's* case (*supra*), being an appeal from our Federal Court, the Privy Council cited with approval, the case of *In re King's Leasehold Estates* (*supra*), and in the latter case, the tenant was promised that so long if he paid rent when due, the rent would not be increased, neither a notice to quit would be issued, it was held that a tenant with such an agreement would not be allowed by the Court to be turned out of possession though he had no defence in law. In the case of *Zimbler v. Abrahams* (*supra*), the agreement or document with the tenant was in the following words:

> I agree not to raise Mr. Abrahams any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit. Any time Mr. Abrahams wishes to move out, I promise to return him the 61 he has paid me on taking possession of the house.

The house was expressly let at a weekly rent. The tenant was treated by the landlord there as a weekly tenant and served with a notice to quit. It was held that the document could not be treated as creating a weekly tenancy and though it was void for not being by deed for attempting to create a demise for life, the defendant was entitled to specific performance for a lease for life subject to the two conditions of paying rent regularly and of his determining his life interest by moving out. If he was entitled to specific performance, it was held further that it followed that he was not liable to be ejected.

The principle must have been based on what Syed Agil Barakbah J (as he then was) said in *Ong Heng Hwa's* case (*supra*) at p. 127, to quote:

> The net result of all these authorities points to the conclusion that a contract, wherever possible, should be construed so that the intention of the parties may be carried out rather than frustrated.

In other words, equity looks at that as done which ought to be done.

The principle deducible from the above cases must be clearly set apart and distinguished from another principle of equity which was explained by Lord Kingsdown in *Ramsden v. Dyson* [1866] LR 1 HL 129 in these words:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation ...

This principle was followed or approved repeatedly in a large number of cases, notably in the Privy Council case of *Plimmer v. Mayor etc. of Wellington* [1884] 9 App. Cases 699; *Errington v. Errington* [1952] 1 KB 290; *Inwards v. Baker* [1965] 1 All ER 446; *Chalmers v. Pardoe* [1963] 3 All ER 552; and our recent Federal Court cases of *Paruvathy v. Krishnan* [1983] 2 MLJ 121; and *Mok Deng Chee v. Yap See Hoi* [1981] 2 MLJ 321. It was here that the landlords might have been confused when they filed this appeal as they did. Each of the two distinct principles, if found applicable, can protect a person in occupation of land, from being turned out of possession, by the land owner. If a case comes within the ambit of the principle of the Court enforcing an agreement as one for a lease in equity, a tenant may ask the Court to grant him specific performance of such an agreement. If a case on the other hand, comes within the scope of the other principle of an equity arising from expenditure of money by one person on land or another person because of reliance on that other person's encouragement, then a person in occupation of the land in question may ask the Court for such equity to be satisfied. *Inter alia*, the Court may have this equity satisfied by allowing the person in occupation to remain on the land so long as he desires as in the case of *Inwards v. Baker* (*supra*) or by allowing that other person to recover the land from the person in occupation by requiring further that other person to make appropriate recompense to the person hitherto in occupation as was done in the case of *Khew Ah Bah v. Hong Ah Mye* [1971] 2 MLJ 86. Both principles sometimes are applicable in a same case. In such event, a person in occupation of land, faced with an eviction action for example, would have two shields instead of one to defend himself with or to counter-attack the other. A person so in occupation, it goes without saying, must come to equity with clean hands, e.g. he should not be guilty himself of any breach of any condition of an agreement for which he seeks specific performance i.e. that he must bring himself within the circumstances which will invite a Court of Equity to so intervene on his behalf.

Thus it will be seen that failure to call the witness in question to prove the payment of " tea-money" would not deprive the tenants in any way of the right to remain in occupation of the premises in question conferred on the tenants by the agreement in question. If the tenants had filed their proceedings in this Court and had counter-claimed for specific

performance of the said agreement, this Court would have allowed it. Even though the tenants had not so counter-claimed, they could still not be turned out of possession for if they were entitled to specific performance of a lease for 30 years, they were entitled not to be evicted.

I therefore dismissed the appeal with costs.

Also found at [1984] 2 CLJ 302